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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 196

GENERAL ENGINEERING CORP., ET AL.,
Appellants,

vs.

TEXAS UNEMPLOYMENT COMPENSATION COMMISSION, ET AL.,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

STATEMENT AS TO JURISDICTION

I. Statutory Provisions Sustaining Jurisdiction

This is an appeal under Section 1257 (2) of Title 28 U. S. Code "Judicial Code and Judiciary" (Public Law 773 enacted by the 80th Congress, Chapter 646, Second Session) from a final judgment of the Supreme Court of Texas. The validity of a statute of the State of Texas was drawn in question as being repugnant to the due process clause and the equal protection clause of Section 1 of the 14th Amendment to the Constitution of the United States, and the Supreme Court of Texas held such statute valid

and not repugnant to or in violation of either of said provisions of the 14th Amendment.

II. State Statute Involved

Subsection 5 (c) (7) of Article 5221b, Texas, R. C. S. (Gen. Laws of Texas, 1941, 47th Leg. p. 101-104, ch. 83, Sec. 1 as amended, Acts 1943, 48th Leg. p. 585, and Acts 1945, 49th Leg. p. 589), and particularly requirement (i) thereof is the statute of the State of Texas which is involved. The pertinent portion of said statute reads as follows:

> "(7) For the purposes of this Section, two or more employing units which are parties to or the subject of a merger, consolidation, or other form of reorganization effecting a change in legal identity or form, shall be deemed to be a single employing unit if the Commission finds that (i) *immediately after such change the employing enterprises of the predecessor employing unit or units are continued solely through a single employing unit as successor thereto;* and (ii) immediately after such change such successor is owned or controlled by substantially the same interests as the predecessor employing unit or units; and (iii) the successor has assumed liability for all contributions required of the predecessor employing unit or units; and (iv) the consideration of such two or more employing units as a single employing unit for the purposes of this Section would not be inequitable."

III. Date of Decree Sought to be Reversed and Date Application for Appeal was Presented

The original opinion of the Supreme Court of Texas in this case was rendered on February 2nd, 1949. Motion for Rehearing was filed by your appellants in the time and manner required by the laws and Rules of Procedure of Texas, and was overruled on March 9th, 1949, by the Supreme Court of Texas. The Judgment of said Supreme

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Court became final on March 24th, 1949. Application for allowance of appeal in this case was presented to the Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States, on the 6th day of June, 1949.

IV. The Nature of the Case and Rulings of the Court

Appellants, General Engineering Corp. and General Industrial Supply Corp., filed this suit on January 30th, 1947, in the District Court for the 53rd Judicial District of Texas, against Texas Unemployment Compensation Commission, Harry B. Crozier, Robert McKinley, Tom Bullock Hyder, the individual members thereof, the Treasurer of the State of Texas, Jesse James, and the Attorney General of the State of Texas, the Hon. Price Daniel. The suit was filed to recover certain employers' contributions theretofore paid by your appellants to the Texas Unemployment Compensation Commission under protest. Appellees, Texas Unemployment Compensation Commission, et al., contended that under the Texas Unemployment Compensation Act (Art. 5221b, *et seq.*, Texas R. C. S.) appellants were required to pay employers' contributions at the rate of 2.7 percent of wages paid by appellants with respect to employment. Appellants contended that they were entitled to retain the experience rating earned by their predecessor, General Engineering Company, a limited partnership, and that they were therefore entitled to pay employers' contributions at the lower rate of .5 percent. The District Court rendered judgment February 9th, 1948, that your appellants were a single employing unit as that term is used in Requirement (i) of Art. 5221b, 5 (c) (7) Texas, R. C. S., and that your appellants satisfied all other requirements of said Subsection 5 (c) (7), and were therefore entitled to pay employers' contributions at the lower rate of .5 percent. All defendants, Texas Unemployment Compensation Com-

mission, et al., appealed to the Court of Civil Appeals for the 3rd Supreme Judicial District of Texas, contending that appellants did not satisfy said Requirement (i), and on June 16th, 1948, said Court of Civil Appeals rendered an opinion affirming the judgment of the District Court. Motion for Rehearing, filed by said defendants, was denied on July 7th, 1948. The case is reported in 213 S. W. (2) 151. The opinion of the Court of Civil Appeals in this case refers to the opinion of that Court in a similar case decided on the same date, *Dallas Liquor Warehouse No. 4, et al.*, v. *State, et al.*, which is reported in 213 S. W. (2) 147. The defendants, Texas Unemployment Compensation Commission, et al., applied for writ of error to the Supreme Court of Texas, which was granted, and on February 2nd, 1949, the Supreme Court of Texas reversed the judgments of both lower courts and rendered judgment against your appellants and in favor of the Texas Unemployment Compensation Commission and all of the other defendants in this case. The Supreme Court of Texas adopted a different construction of Requirement (i) of Subsection 5 (c) (7), Art. 5221b, Texas R. C. S. than that of the District Court and the Court of Civil Appeals, and held that your appellants did not satisfy said Requirement (i) and were, therefore, not entitled to retain the experience rating of their predecessor, General Engineering Company. Said Subsection had not been previously construed by the Supreme Court of Texas.

Your appellants then in the time and manner provided by law and the Rules of Procedure of the State of Texas, filed their Motion for Rehearing in this case, and in said Motion for Rehearing drew in question the validity of Subsection 5 (c) (7) of Art. 5221b, Texas R.C.S. and particularly Requirement (i) thereof, urging that said Subsection, and particularly Requirement (i) thereof as construed by the Supreme Court of Texas was repugnant to,

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and in violation of, the due process clause and the equal protection clause of Section 1 of the 14th Amendment to the Constitution of the United States.

The Supreme Court of Texas considered and passed on said constitutional questions in overruling said Motion for Rehearing on March 9th, 1949, holding that said statutory provisions as construed by the Supreme Court of Texas, are valid and are not repugnant to, and do not violate, either of the indicated provisions of the 14th Amendment to the Constitution of the United States. Reference is made to the order of the Supreme Court of Texas, overruling said Motion for Rehearing.

The judgment of the Supreme Court of Texas is final and is the decision of the highest court of the State of Texas having jurisdiction to decide this case. Attached hereto is a copy of the opinion of the Supreme Court of Texas in this case and a copy of the opinion of said Court in the similar case of *State, et al.*, v. *Dallas Liquor Warehouse No. 4, et al.*, which was decided by said Court on the same date. Said opinions are reported in 217 S. W. (2) 659, and 217 S. W. (2) 654, respectively.

Justice G. B. Smedley, of the Supreme Court of Texas, dissented from the original opinion in each of said cases and also from the order overruling the Motion for Rehearing in each of said cases.

V. Cases Believed to Sustain Jurisdiction

The following cases are believed to clearly sustain the jurisdiction of this Court on the ground that the action of the Supreme Court of Texas could not have been reasonably anticipated and on the further ground that the constitutional questions were timely raised in accordance with the laws and Rules of Procedure of the State of Texas, and said questions were considered and decided by the

Supreme Court of Texas in overruling your appellants' Motion for Rehearing in said Court.

Lisbena v. *California,* 314 U. S. 219, 62 S. Ct. 280, 86 L. Ed. 166;

International Steel & Iron Co. v. *National Surety Co.,* 297 U. S. 657, 56 S. Ct. 619, 80 L. Ed. 961;

Great Northern Ry. Co. v. *Sunburst Oil & Ref. Co.,* 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A.L.R. 254;

Cumberland Coal Co. v. *Bd. of Revision, etc.,* 284 U. S. 23, 52 S. Ct. 48, 76 L. Ed. 146;

Missouri v. *Gehner,* 281 U. S. 313, 50 S. Ct. 326, 74 L. Ed. 870;

Saunders v. *Shaw,* 244 U. S. 317, 37 S. Ct. 638, 61 L. Ed. 1163.

VI. Grounds upon which Appellants Contend the Federal Questions are Substantial

The decision of the Supreme Court of Texas that Subsection 5 (c) (7) Art. 5221b, Texas R.C.S., and particularly Requirement (i) thereof as construed by said Court does not violate and is not repugnant to either the due process clause or the equal protection clause of Section 1 of the 14th Amendment to the Constitution of the United States, is contrary to the following decisions:

F. S. Royster Guano Co. v. *Virginia,* 253 U. S. 412, 40 S. Ct. 560, 64 L. Ed. 989:

> "But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Hartford Steam Boiler Inspection & Ins. Co., et al., v. *Harrison,* 301 U. S. 459, 57 S. Ct. 838, 81 L. Ed. 1223;

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Mayflower Farms, Inc. v. *Ten Eyck, et al.*, 297 U. S. 266, 56 S. Ct. 457, 80 L. Ed. 765;

Stewart Dry Goods Co. v. *Lewis, et al.*, 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed. 1054;

Liggett Co., et al. v. *Lee, et al.*, 288 U. S. 517, 53 S. Ct. 481, 77 L. Ed. 929;

Quaker City Cab Co. v. *Penn.*, 277 U. S. 389, 48 S. Ct. 553, 72 L. Ed. 927;

Louisville Gas & Electric Co. v. *Coleman*, 277 U. S. 32, 48 S. Ct. 423, 72 L. Ed. 770;

Schlesinger, et al. v. *Wisconsin, et al.*, 270 U. S. 230, 46 S. Ct. 260, 70 L. Ed. 557;

Air-Way Electric Appliance Corp. v. *Day, et al.*, 266 U. S. 71, 45 S. Ct. 12, 69 L. Ed. 169;

A. T. & S. F. Ry. Co. v. *Vosburg*, 238 U. S. 56, 35 S. Ct. 675, 59 L. Ed. 1199;

Southern Ry. Co. v. *Greene*, 216 U. S. 400, 30 S. Ct. 287, 54 L. Ed. 536;

G. C. & S. F. Ry. Co. v. *Ellis*, 165 U. S. 150, 17 S. Ct. 255, 41 L. Ed. 666.

The Supreme Court of Texas held in this case that Requirement (i) of Subsection 5 (c) (7) Art. 5221b, Texas R.C.S., prevented the retention of an experience rating if, immediately following the reorganization of a business, the business was carried on by more than one legal entity. If only one legal entity existed immediately following the reorganization of a business, Requirement (i) would not prevent that one legal entity from retaining the experience rating of the business.

The purported classification of employer-taxpayers resulting from said Requirement (i) as construed by the Supreme Court of Texas has no reasonable relationship to the object of the Texas Unemployment Compensation Commission as a whole or any part thereof. Section 5 of

Art. 5221b provides for employers' contributions and fixes the rate at which such contributions shall be paid. This Section 5 requires that an employer pay contributions at the rate of 2.7 percent for the first three years he is subject to the Act. A plan is set up by Subsection (c) of said Section 5 whereby the rate of contributions may be reduced after the first three years of an employer's experience under the Act. The amount of reduction of the rate of each employer (his experience rating) is, by the statute, based upon his own employment experience modified by the employment experience of all employers subject to the Act. Subsection (7) was added to said Subsection 5(c) as an amendment to insure that employers could retain such experience ratings previously earned after a change of the legal identity or form in which the business was conducted.

The purpose of the entire Texas Unemployment Compensation Commission Act is, of course, to provide for the relief of the unemployed. The object of Section 5 of Art. 5221b, Texas R.C.S., is to procure the funds for this commendable purpose by levying employers' contributions in the nature of excise taxes upon the employers of Texas. The object of Subsection (c) of said Section 5 is to equitably distribute the incidence of the tax among the employers covered by the Act by requiring each employer to pay in proportion to his employment experience. An employer who has a high rate of employment turnover is required to pay contributions at a higher rate than an employer who affords steady and permanent employment. Thus, another object of said Subsection (c) was to increase stability of employment by affording a tax benefit to the employer who maintains such stability.

The Legislature of Texas, in enacting Subsection (7) of said Subsection 5 (c) recognized that mere changes in legal identity or form had no relationship to the basic

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issue of stability of employment. The very purpose of said Subsection (7) was to disregard fiction, and by looking to economic reality, to permit continuation of experience ratings regardless of changes in legal identity or form whenever management and control, the factors which actually affect and govern the employment experience of any business, remain the same. The object of this Subsection (7) then, was not to penalize a good businessman who had afforded steady and permanent employment, but was rather to insure to such an employer the right to change the legal identity or form of his business without losing the tax benefit which he had earned, at the same time continuing the equitable distribution of the burden of the tax among employers according to the employment experience of each.

The classification attempted by Requirement (i) is based solely upon the number of legal entities existing immediately after a business has been reorganized. Not only does this purported classification have no reasonable relationship to the object of Subsection (c), it is in direct conflict with the obvious object and purpose of Subsection (c) (7) wherein it appears.

That the classification attempted by Requirement (i) is illusory is clearly demonstrated by the following examples. If A owns a business and organizes a corporation through which he will operate part of the business, he may retain his experience rating for that portion of the business continued by him as an individual, but cannot retain it for that part of the business continued through the corporation. If, on the following day, he dissolves the first corporation and forms a new corporation through which he will operate all of his business, the entire business again is entitled to the experience rating. If, however, A had, at the outset, formed two corporations through each of which he operated a part of his business, neither of the corporations could have succeeded to his experience rating, and if, on the next

day, those two corporations were dissolved and a single corporation formed through which A would operate the entire business, A would not be permitted to retain his experience rating for the business which he conducted through the new corporation. This would be so, even though two days before A had operated the same business as an individual. If, instead of forming a new corporation after dissolving the two he had originally formed, A should simply dissolve those two corporations and again operate the business as an individual, the result would be the same and A would be cut off from his experience rating.

In the final analysis, the supposed classification of employers attempted by Requirement (i) is not based upon the number of legal entities involved nor the management or control thereof, but is based upon the time at which the respective legal entities were organized. This may be a difference, but if so, it is clearly an arbitrary one having no connection with, or relation to, the object or the purpose of the legislation here in question as required by the cases cited above in this paragraph VI.

VII. It is therefore respectfully submitted that this Court has jurisdiction of this appeal under Section 1257 (2) of Title 28 U. S. Code, as amended.

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EXHIBIT "A"

IN THE SUPREME COURT OF TEXAS, FROM TRAVIS COUNTY, THIRD DISTRICT.

No. A-1871

TEXAS UNEMPLOYMENT COMPENSATION COMMISSION, ET AL., *Petitioners,*

vs.

GENERAL ENGINEERING CORPORATION, ET AL., *Respondents.*

General Engineering Corporation, *et al.,* respondents, sued Texas Unemployment Compensation Commission, *et al.,* petitioners, in their official capacities, to recover unemployment compensation taxes paid under protest. A trial court judgment for respondents was affirmed by the Court of Civil Appeals. 213 S. W. 2d. 151.

General Engineering Company was a limited partnership doing an engineering and construction business and handling industrial materials and supplies. As the only general partner, one Sprekelmeyer was in exclusive control of its operations and business. Because of a favorable benefit wage ratio, the partnership enjoyed the minimum of ½ per cent. on its payrolls as its unemployment compensation tax, under the provisions of Art. 5221b—5, V.A.C.S.

On January 9, 1946, General Engineering Corporation and General Industrial Supply Corporation, respondents, were incorporated, the former to take over the engineering business and the latter the supply business of the partnership, General Engineering Co. Both corporations remained under the active control and management of Sprekelmeyer. Each had more than eight employees, and that rendered each liable for unemployment compensation contributions, without regard to the provisions of Sec. 17(f) (4), of Art. 5221b, *supra;* so the Commission set up a separate account for each of them.

However, the Commission fixed their rate at 2.7 per cent., in spite of their claim that they were entitled to the experience rate of ½ per cent. formerly enjoyed by General Engineering Co., their predecessor. Respondents paid on the

2.7 per cent. rate under protest, and brought this suit to recover the difference between what they paid and what they would have paid under the claimed rate of ½ per cent. The basis of their contention is that since the corporations operated under the unified control of Sprekelmeyer, they should be held to be a single employing unit in successorship to General Engineering Co., under the provisions of subsection c (7), of Art. 5221b—5, *supra*.

It is obvious that the question thus presented is identical with that this day decided in the State of Texas, *et al., vs.* Dallas Liquor Warehouse No. 4, *et al.*, 217 S. W. 2d., 654. For the reasons there stated, we have concluded that respondents' proposition is not tenable.

Accordingly, both judgments below are reversed and judgment is here rendered for petitioners.

FEW BREWSTER,
Associate Justice.

Associate Justice Smedley dissenting.
Opinion rendered Feb. 2, 1949.

EXHIBIT "B"

IN THE SUPREME COURT OF TEXAS, FROM TRAVIS COUNTY, THIRD DISTRICT.

No. A-1871

TEXAS UNEMPLOYMENT COMPENSATION COMMISSION, ET AL., *Petitioners,*

vs.

GENERAL ENGINEERING CORPORATION, ET AL., *Respondents.*

DISSENTING OPINION

I dissent from the opinion of the majority for the same reasons as those given in my dissenting opinion in State of Texas, *et al., v.* Dallas Liquor Warehouse No. 4, *et al.*, No. A-1870.

G. B. SMEDLEY,
Associate Justice.

Opinion delivered Feb. 2, 1949.

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EXHIBIT "C"

IN THE SUPREME COURT OF TEXAS, FROM TRAVIS COUNTY, THIRD DISTRICT.

No. A-1870

STATE, ET AL., *Petitioners,*

vs.

DALLAS LIQUOR WAREHOUSE No. 4, ET AL., *Respondents.*

This cause is a consolidation of four identical suits filed by the State of Texas, *et al.*, petitioners, against Dallas Liquor Warehouse No. 4, Dallas Liquor Warehouse No. 3, Dallas Liquor Warehouse No. 1, and Waco Centennial Liquor Stores, respondents. A trial court judgment for petitioners was reversed and rendered for respondents by the Court of Civil Appeals. 213 S. W. 2d 147.

On January 1, 1946, one Cole owned and operated three liquor stores in Dallas, known as Dallas Warehouse Liquor Store No. 1, No. 3 and No. 4, respectively, two liquor stores in Perry, known as Waco Centennial Liquor Store No. 1 and No. 2, respectively, and a jewelry store at Waco, known as Towne Jewelers.

On that date the Texas Unemployment Compensation Commission (hereinafter called "the Commission") fixed a rate of ½ per cent. on all the payrolls of Cole as his unemployment compensation tax. That rate was based on his favorable benefit wage ratio for the three years immediately preceding, under the provisions of Art. 5221b—5, Vernon's Ann. Civ. St. He paid at that rate on his six businesses for January and February, 1946.

On March 1, 1946, Cole formed four corporations, three to own and operate the three liquor stores at Dallas and to be known as Dallas Liquor Warehouse No. 1, No. 2, and No. 3, respectively, and one to own and operate the two liquor stores at Perry and to be known as Waco Centennial Liquor Store. Thereafter Cole controlled each corporation as its president and majority stockholder, and there was no change in the type of business management, payroll, method

or scope of operations of the five liquor stores. As an individual, Cole continued to own and operate Towne Jewelers at Waco.

Thereupon the Commission determined that these four corporations and Towne Jewelers constituted a single employing unit under Section 17 (f) (4) of Art. 5221b, V.A.C.S., so as to make all subject to a tax, although only one of them had more than 8 employees. At the same time, however, the Commission further determined that these four corporations and Towne Jewelers were not a single employing unit under the provisions of Sec. (c), Art. 5221b—5, *supra*, so as to allow the corporations to succeed to the experience rate of ½ per cent. formerly allowed Cole.

Our question is whether this latter determination is correct, respondents having tendered all taxes due under the ½ per cent. rate.

Sec. 17 (f) (4), *supra*, says an employer is "Any employing unit which, together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise), directly or indirectly by the same interest, or which owns or controls one or more other employing units (by legally enforceable means or otherwise), and which if treated as a single unit with such other employing unit, would be an employer" as having eight employees, under (f) (1) of Sec. 17.

Under this statute the Commission correctly disregarded the corporate fiction to determine that the four corporations and the jewelry store remained a single employing unit so as to make all of them subject to a tax, although only one of them had as many as 8 employees. That construction "tends to aid a more effective administration of the Act in that the number of small units from which contributions are to be made will be reduced, while the benefits to be derived from the unemployment insurance will be extended to a larger number of individuals." State, *et al.*, *v.* Ratliff, Tex. Civ. App., 200 S. W. 2d 645, 646, er. ref. "Its purpose was to bring under the Act as employers, employing units, which, but for its provisions, would not be liable as employers, and thus prevent their escaping tax liability." James *v.* Consolidated Steel Corporation, Tex. Civ. App.,

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195 S. W. 2d 955, 965, er. ref., N.R.E. And see Fleming Hospital *v.* Williams, Tex. Civ. App., 169 S. W. 2d 241, er. ref., want merit; Washington Oil Corporation *v.* State, Tex. Civ. App., 159, S. W. 2d 517.

Numerous other states have passed an unemployment compensation act like ours. In most of them the "common control" or "affiliate" clause is identical with Sec. 17(f)(4), supra; and their courts have likewise "gone behind the veil" and "pierced the corporate fiction" to determine whether plural corporations were "owned or controlled * * * directly or indirectly by the same interest." For example, in Unemployment Compensation Commission *v.* City Ice & Coal Co., 216 N.C. 6, 3 S.E. 2d 290, 292, the Supreme Court of North Carolina said, "When the interrelationship existing between or among two or more business enterprises is such that a substantial unification of those enterprises emanating (emanates?) from a common source or fountain-head, the General Assembly has declared that, since the separate identity of the enterprises has in large measure been swallowed up in such unification, these affiliated enterprises are to be taxed under this Act not as separate units but as a single, employing unit. The view here presented is supported by, and is in keeping with, the general intent of the Unemployment Compensation Act. It regards corporate organization objectively and realistically, unencumbered by fictions of corporate identity, and thus, brushing aside form, deals with substance." The Supreme Court of Maine has said that in writing the "Common Control" clause into the Act in that state the legislature must have "intended to go behind the corporate veil and discover actuality. * * * Otherwise, an individual intending to carry on a business of considerable magnitude, requiring the employment of many more than eight, could organize several corporations, each employing less than eight, escape contribution, and deprive many employees of the benefits intended by the Act." Maine Unemployment Compensation Commission v. Androscoggin Junior, Inc., 137 Me. 154, 16 A. 2d 252, 256. Many cases from other jurisdictions dealing with this or a substantially similar clause are discussed in the annotations appearing in 142 A.L.R. 718, and 158 A.L.R. 1237.

Since the corporate fiction was properly disregarded to establish tax liability against all respondents, were they entitled to have it disregarded in order to get the benefit of a favorable compensation rate under the provisions of Art. 5221b—5(c)(1) to (7)?

Subsection (c)(7) of that article reads: "For the purposes of this Section, two or more employing units which are parties to or the subject of a merger, consolidation, or other form of reorganization effecting a change in legal identity or form, shall be deemed to be a single employing unit if the Commission finds that (i) immediately after such change the employing enterprises of the predecessor employing unit or units are continued solely through a single employing unit as successor thereto; and (ii) immediately after such change such successor is owned or controlled by substantially the same interests as the predecessor employing unit or units; and (iii) the successor has assumed liability for all contributions required of the predecessor employing unit or units; and (iv) the consideration of such two or more employing units as a single employing unit for the purposes of this Section would not be inequitable."

The Court of Civil Appeals held that respondents and Towne Jewelers constitute a single employing unit and are entitled to the contribution rate earned by their predecessors' three years' experience because they met all the four conditions prescribed by the statute just quoted. Petitioners contend that respondents "cannot satisfy or meet Condition (i);" that is, they assert that after the formation of the four corporations the employing enterprises of Cole as predecessor employing unit were not continued solely through a single employing unit as successor. They argue that prior to March 1, 1946, Cole, as an individual employing unit, owned and operated six employing enterprises; that when he created the four corporations on March 1, 1946, each of them became a separate entity and therefore a separate and distinct employing unit; that thereby the original individual employing unit was split into several units and five separate legal entities survived.

Respondents contend that since the Commission has treated the enterprises owned and controlled by Cole as a

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single employing unit to determine tax liability, it would be inequitable and unfair not to treat them as a single employing unit in determining succession to experience rating. In support they cite the opinion of the Supreme Court of Tennessee in Royal Jewelers Co. v. Hake, 185 Tenn. 254, 205, S.W. 2d 963, 965, wherein, under parallel facts, it is said: "The record discloses that the Commissioner, since the organization of the three corporations, to fix tax liability, has disregarded separate corporate entities and levied the tax on the Busch jewelry business as a single unit. Apparently the complainants have accepted this assessment and paid taxes thereon without protest. Had the Commissioner respected the separate entity of the corporations, 'McKullocks' would escape liability for the tax because it has less than eight employees and so it is not a liable employer under the Act. In fairness, if the three corporations are to be regarded as a single entity to fix tax liability, they are to be regarded as a single entity to succeed to the experience benefits of the parent partnership."

The precise question at bar has never been authoritatively determined in Texas, so we must turn to the decisions in other states for the answer. Those construing statutes identical in all material respects with Subsec. (c) (7), supra, are of course the most helpful. Two such decisions are Ned's Auto Supply Co. *v.* Michigan Unemployment Compensation Commission, 313 Mich. 66, 20 N.W. 2d 813, by the Supreme Court of Michigan, and El Queeno Distributing Co. *v.* Christgau, 221 Minn. 197, 21 N.W. 2d 601, by the Supreme Court of Minnesota.

The Michigan Act provided that the experience records of two or more employers could be combined as if they were that of a single employer if the Commission should find "that 2 or more employing units have been parties to or the subject of a merger, consolidation or other form of reorganization effecting a change in legal entity or form, and immediately after such change substantially all the employing enterprises of the predecessor employing units are continued solely through a single employing unit as successor thereto." Comp. Laws Supp. 1942, § 8485-62. Five partners, operators of a wholesale and retail automobile service and supply business, formed two corpora-

tions, which together took over all the partnership business. Each partner took one fifth the capital stock in each corporation, and "all essential activities of the predecessor partnership • • • were continued without break or interruption, by the same individuals, at the same places of business, and in exactly the same fashion, as before such change-over." (313 Mich. 66, 20 N. W. 2d 814.) The question was whether these corporations were entitled, under the provisions of the quota statute, to have their experience record of one year combined with those of the predecessor partnership for previous years to secure a more favorable rate. In support of their claim to the more favorable rate, the corporations made exactly the same contention that respondents make here: that since their accounts had been combined with those of the predecessor partnership to render them subject to the tax, their experience records should be combined with that of their predecessor to determine their contributions rate. But the Supreme Court of Michigan held that the two corporations could not qualify as a "single employing unit" under the statute above quoted "unless their corporate entities were disregarded", which could not be done because the corporations were two separate and distinct legal entities and, therefore, two separate employers,—"a single partnership had been split into two separate corporations, and under section 22 quoted above they could not be combined as a 'single' successor employing unit." Ned's Auto Supply Co. *v.* Michigan Unemployment Compensation Commission, supra.[1]

The relevant section of the Minnesota Act. M.S.A. § 268.06, was formerly identical with our subsection (i)

[1] This decision is rendered more persuasive by the fact that that court had already held that the common-control clause of the Michigan Act, which is identical with our Sec. 17(f) (4), supra, was properly applied to two corporations, despite the corporate fiction, when one individual owned 51 per cent. of the capital stock of one and all the stock of the other, so as to make both liable to the tax, just as our courts have held in *State et al.* v. *Ratliff* and the other cases cited above. *Iron Street Corporation* v. *Michigan Unemployment Compensation Commission*, 305 Mich. 643, 9 N.W. 2d 874. And the court further held that such application of the Michigan common-control clause was not a denial of due process but was valid, since its purpose was to prevent employers from avoiding the obligations of the Compensation Act by dividing their businesses.

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of Sec. (c)(7), supra. Several corporations, formed to take over the business of a partnership, insisted that they remained a "single employing unit" and therefore entitled to the experience rate earned by the partnership. But the Supreme Court of that state refused to disregard the corporate entity, under authority of Ned's Auto Supply Co. *v.* Michigan Unemployment Compensation Commission, supra, in these words: "We feel that the logic upon which the Michigan decision is based is sound, and, in the absence of all other authority on the question * * * that the result arrived at is proper and should be followed here, where the facts and the applicable statutory provisions are so nearly identical. This construction should tend toward establishing stability and result in the equitable application of the provisions of this section as contemplated by the legislature." El Queeno Distributing Co. v. Christgau, supra (221 Minn. 197, 21 N.W. 2d 604).

Two cases cited in the briefs which hold contrary to the conclusion reached by the Supreme Courts of Michigan and Minnesota, are Packard Clothes, Inc., *v.* Director of Division of Employment Security, 318 Mass. 329, 61 N.E. 2d 528, 531, by the Supreme Judicial Court of Massachusetts, and Royal Jewelers Co. *v.* Hake, supra, from which we have already quoted. In the Packard case the individual owner organized two corporations to take over his two businesses, took a majority of the stock in both corporations and continued thereby to control them. However, all of the employees concerned were carried on the rolls of one of these corporations while the other was obviously a dummy, "manifestly", the court said "no more than an empty shell." Moreover, at the time of this reorganization the Massachusetts Act carried no specific provision authorizing transfer of an experience rating following a reorganization. Although presenting a parallel fact situation, the statute construed and applied in the Hake case, supra, by the Supreme Court of Tennessee, was materially different from the provisions of our (c) 7, supra. It reads: "Provided, that in the event of a successorship or merger of employers or employing units, the combined experience of the employers or employing units involved shall be computed as of the first day of the calendar quarter immediately following

such merger or successorship to determine a new reserve ratio and rate applicable to said combined or successor employer or employing unit. *For the purposes of this subsection only, an employing unit shall be deemed to be the successor of a former employer if it is shown that such employing unit acquired the organization, trade or business, or substantially all the assets of the former employer.*" Code, § 6901.31. (Italics ours.) In view of these differences, we do not regard the Packard and Hake cases as having any controlling force as precedents on the question at bar. On the other hand, the Michigan and Minnesota cases are on all fours with this.

Unemployment compensation legislation has developed in this country within the last fifteen years, hence many phases of it have not been construed. The cases we have discussed appear to be the only ones that have comprehensively considered the issue now before us. It is both important and desirable that our several jurisdictions attain as much uniformity as possible in the construction of this legislation. Therefore, to paraphrase the language of the Supreme Court of Minnesota in El Queeno Distributing Co. v. Christgau, above quoted, we feel that the logic upon which the Michigan and Minnesota decisions are based is sound and, in the absence of other authoritative expressions on the question, that those decisions should be followed here, where the facts and the applicable statutory provisions are so nearly identical. So we follow them.

Accordingly, the judgment of the Court of Civil Appeals is reversed and that of the trial court is affirmed.

FEW BREWSTER,
Associate Justice.

Associate Justice Smedley dissenting.

Opinion rendered Feb. 2, 1949.

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EXHIBIT "D"

IN THE SUPREME COURT OF TEXAS, FROM TRAVIS COUNTY, THIRD DISTRICT

No. A-1870

STATE, ET AL., *Petitioners*,

v.

DALLAS LIQUOR WAREHOUSE NO. 4, ET AL., *Respondents*

DISSENTING OPINION

I cannot agree with the opinion of the majority. In my opinion the statute involved herein was correctly construed by the Court of Civil Appeals and its judgment should be affirmed. The construction given similar statutes by the Michigan Court and the Minnesota Court, which the opinion of the majority follows, is narrow and technical and is unfair in its application, while the construction given our statute by the Court of Civil Appeals is reasonable and is fair and just in its application.

G. B. SMEDLEY,
Associate Justice.

Opinion delivered Feb. 2, 1949.

EXHIBIT "E"

IN THE SUPREME COURT OF TEXAS

No. A-1871

TEXAS UNEMPLOYMENT COMPENSATION COMMISSION, ET AL., *Petitioners,*

v.

GENERAL ENGINEERING CORPORATION, ET AL., *Respondents*

ON RESPONDENTS' MOTION FOR SUPPLEMENTAL ORDER

On this, the second day of June, A.D. 1949, it is ordered that the respondents' motion for supplemental order be, and the same is hereby, granted and that the order of this Court dated March 9, 1949, overruling the respondents' motion for rehearing is hereby amended by the order of this Court so as to read as follows:

"The motion for rehearing filed herein by the respondents having been submitted to this Court, and after due consideration of the same, the Court being of the opinion that the respondents have properly raised in this Court all of the points set out in said motion, including Point No. 8 in which the respondents urge that Section 5 (c) (7) of Article 5221b, Vernon's Texas Civil Statutes, as construed by this Court, violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the Court having duly entertained said motion and considered said points, including Point No. 8, and being of the opinion that the said article as so construed does not violate the Fourteenth Amendment to the Constitution of the United States, and that none of the other points raised in said motion should be sustained,

"It is ordered that said motion for rehearing be and the same is hereby overruled."

Entered June 2, A.D. 1949.

No. 196. GENERAL ENGINEERING CORP. ET AL. *v.* TEXAS EMPLOYMENT COMMISSION (FORMERLY KNOWN AS TEXAS UNEMPLOYMENT COMPENSATION COMMISSION) ET AL. Appeal from the Supreme Court of Texas. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *A. C. Heath* for appellants. *Price Daniel*, Attorney General of Texas, for appellees. Reported below: 147 Tex. 503, 217 S. W. 2d 659.